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No. 92-1526

IN THE

Supreme Court of the United States

October Term, 1992

JAMES THOMSON,
Petitioner,

vs.

WILLIAM P. SCHEID, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENTS WILLIAM P. SCHEID, ERIE COUNTY DEPARTMENT OF HUMAN SERVICES AND CATHERINE R. DEWALT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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RESTATEMENT OF QUESTION PRESENTED

Whether the opinion of the court below, affirming the district court's award of summary judgment to the Respondents, creates a direct conflict among the courts of appeals so as to necessitate resolution by this Court of the First Amendment issues determined below.

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OPINIONS BELOW

The Respondents do not contest the Statement of Opinions of the United States District Court for the Northern District of Ohio and of the United States Court of Appeals for the Sixth Circuit set forth in the Petition for Writ of Certiorari.

STATEMENT OF JURISDICTION

The Respondents do not contest the statement of jurisdictional grounds set forth in the Petition for Writ of Certiorari.

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Respondents do not dispute the Petitioner's statement of the constitutional provision and the statute which must be considered in connection with this case.

STATEMENT OF THE CASE

Petitioner is a historically litigious former employee of Erie County, Ohio. In his Statement of the Case, he weaves a sinister tale of intrigue and conspiracy. However, in large part, it is a creation of his imagination rather than a fair summary of the record. Neither the district court nor the court of appeals found support for much of Petitioner's story. *See Thomson v. Scheid,* 977 F.2d 1017, 1019 (6th Cir. 1992). Most importantly, much of Petitioner's statement is irrelevant to the First Amendment claim that he now presses.

Petitioner was hired by the Erie County Department of Human Services in early 1987 and worked there as a fraud investigator for approximately two and one-half years. In 1989, the administrator of the Department of Human Services, Linda Van Tine, left her position with a great deal of animosity toward the Erie County Commissioners. At the time of her departure, she told Petitioner that, during her tenure, she had prepared a job description for a new position within the Department in a way that would disqualify him. These claims by the disgruntled former administrator, as well as Petitioner's long time job frustrations[1], provided the background for this action.

The former administrator claimed that she had modified the job description to exclude Petitioner because of an occasion, soon after Petitioner started working for the Department, when Petitioner had

[1] Petitioner had previously been a sheriff's deputy in Huron County, Ohio. He preferred the freedom that he had with the sheriff's department to the regulation-bound work environment of the Department of Human Services (R. 30: Thomson dep. 107-109, 115). Although Petitioner liked investigative work, the Erie County prosecutor made it clear to Petitioner that prosecution of welfare fraud was not a high priority.

investigated Respondent William P. Scheid, an Erie County Commissioner. On that occasion, Petitioner was assigned to investigate whether Scheid had misstated the assets of a relative for whom he held a power of attorney in an application for Medicaid benefits. After Petitioner had completed his investigation and submitted his report, the issue was presented to the grand jury which returned a "no bill".[2] In April, 1989, the disgruntled former administrator said that Scheid had been unhappy with the way Petitioner conducted the 1987 investigation. She claimed that Scheid referred to Petitioner as "pushy, unprofessional, and son of a bitch". She maintained in 1989 that Scheid had told her in 1987 that Petitioner would never be promoted within the Department and suggested that this was the reason that she redefined the job a year and a half later.

The alleged "no-promotion" statement of Scheid occurred at one meeting soon after Petitioner's investigation of Scheid had ended. After the purported statement, Van Tine had a number of discussions with Petitioner about a possible new position, encouraged Petitioner about his chances of getting the job and advised him to do some preparation for it. Then, without any further contract with Scheid about Petitioner, she supposedly changed the position description. There was no reason for Van Tine to encourage Petitioner if she took any purported statements made by Scheid seriously enough to later change the position description.

Petitioner's Statement of the Case is misleading when it refers to the new position as "his". All positions within the Department of Human Services must be publicly posted and all applicants considered. The State

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[2] Petitioner later encouraged a federal investigation of Scheid. The federal investigation did not result in any criminal charges.

of Ohio Department of Administrative Services must approve all position descriptions. Standard job descriptions are used for most positions. The prospective position which the administrator discussed with Petitioner was not one which had previously been approved by the State of Ohio. Therefore, it would have required approval by the Ohio Department of Administrative Services. The prospective position also would have created organizational and financial complications because it would have combined areas under the authority of separate units within the Department of Human Services which had separate funding sources. Although Van Tine claimed to have changed the job description due to Scheid's purported comment, when she prepared the description she actually used a boilerplate Department of Administrative Services' job description. None of the Erie County Commissioners had any input into the job description which Van Tine prepared.

The administrator and the three Erie County Commissioners had joint appointing authority for positions within the Department of Human Services. Scheid alone could not have prevented a promotion of Petitioner. In fact, during Van Tine's entire time as administrator, the commissioners always followed her job recommendations.

However, Van Tine's story about the denial of "his" promotion seems to have satisfied Petitioner. He had previously sued Huron County, Ohio, his former employer, on two occasions and had sued his own insurance company on another employment-related matter. In 1989, he found a higher paying job with the State of Ohio and resigned his position with Erie County. He then filed this action.

Petitioner attributes several other employment-related actions to his investigation of Scheid. In addition to claiming that he was "denied" the new job position, he cites two occasions when he had unpleasant experiences in his job. On one occasion, his supervisor, Respondent Catherine DeWalt, reprimanded him for performing an unauthorized credit check on a citizen. On another occasion, DeWalt sent him a memorandum reminding him of the need to follow standard departmental procedures.[3] These two incidents are the only actions of a disciplinary nature which involved Petitioner during his employment with Erie County. Now, he claims that these incidents were due to his investigation of Scheid. Yet, he has not produced any evidence that a desire for retaliation motivated these actions. His supervisor never had any discussions with Scheid about Petitioner. Had his supervisor wanted to cause problems for him, she could have created a much more extensive disciplinary record.

This action was originally focused primarily on Petitioner's due process claims. Those claims (as well as Petitioner's First Amendment claim) were rejected by both the district court and the court of appeals. Apparently, Petitioner has determined that his best chance to obtain Supreme Court review is based upon his First Amendment claim, and he now emphasizes that

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[3] Petitioner attempts to use this memorandum as evidence of a hostile work environment and of the removal of his power. However, Petitioner never had the discretion or the power suggested in his Statement of the Case. In fact, the instructions contained in the memorandum are all reminders of standard departmental policies and procedures. Although Petitioner had developed a practice of ignoring these policies, they were applicable throughout his employment and governed the other employees of the Department as well as Petitioner (R. 31: Thomson dep. 5, 9, 18, 21-23, 33).

claim. Because Petitioner was more concerned with his due process claims, he did not clearly develop his First Amendment claim in the courts below.

There is an overwhelming factual problem with Petitioner's attempt to state a First Amendment claim. The basis of Petitioner's claim is that Scheid caused retaliation against Petitioner as a result of Petitioner's participation in the Scheid investigation. Scheid's purported complaints to Van Tine all relate the *attitude* of Petitioner and the *manner in which he conducted* the investigation. The report which Petitioner prepared and his discussions with supervisors were highly confidential. There is no evidence that Scheid ever saw the report, knew of anything that Petitioner said to his supervisors or knew that Petitioner asked federal authorities to investigate Scheid. Since the record does not show that what Petitioner said had any effect on his employment, there is no proper First Amendment claim. Petitioner's arguments show the grossest of factually unsupported *post hoc, ergo propter hoc* reasoning, and the lower courts properly found that Petitioner failed to meet his burden to avoid summary judgment.

SUMMARY OF ARGUMENT

The facts of this case, as described herein and in the decision of the court of appeals, demonstrate that Petitioner was not engaged in protected speech in discussing the Scheid investigation with his supervisors or in preparing his report on that investigation. He was merely performing his job duties in furtherance of the internal operation of the Department of Human Services subject to an obligation of confidentiality. In addition, Petitioner's arguments do not suggest that he suffered retaliation for the content of his speech (which was unknown to Scheid). Petitioner acknowledges that Scheid's complaints concerned Petitioner's attitude and manner of performing his job.

The court of appeals' decision was based upon the particular facts of this case. It has a narrow application to these facts and has no overriding significance. The decision does not set forth any broad constitutional principle which conflicts with the holdings of this Court or of other circuits. This case does not deserve the Court's consideration. In addition, the traditional reluctance of federal courts to become involved in disputes over the terms of employment must also weigh against review of this action. As a result, the Respondents respectfully suggest that the Court deny the motion for a writ of certiorari.

REASONS FOR DENYING THE WRIT

I. Based Upon The Specific Facts Of This Case, The Court Of Appeals Determined That Petitioner Did Not Engage In Speech Protected By The First Amendment.

In his effort to convince this Court to review his case, Petitioner exaggerates the scope of the court of appeals' ruling and emphasizes the significance of legal principles which were not at issue. Petitioner suggests that the court of appeals adopted a "per se" rule holding that an employee speaking as part of his official duties is not protected by the First Amendment. Examination of the court of appeals' decision reveals that it did not adopt such a rule. The court below found that the communications in this case were part of the job responsibilities of the people involved and were subject to an obligation of confidentiality. The court of appeals held that, based upon the narrow and peculiar facts of this case, the discussions concerning the Scheid investigation were matters of internal departmental policy. As a result, the court of appeals determined that the investigative report and related discussions did not amount to "speaking out" on an issue of public concern. *See Thomson v. Scheid, et al., supra* at 1021.

Petitioner relies upon his assertion that the Sixth Circuit panel applied a "per se" rule in order to create an imagined conflict with the decisions of other circuits. Petitioner suggests that the court of appeals' decision is inconsistent with *Koch v. Hutchinson*, 847 F.2d 1436 (10th Cir. 1988) and *Egger v. Phillips*, 710 F.2d 292 (7th Cir. 1983). Although Petitioner focuses on *Koch* and *Egger* as the basis for his conflict argument, he does not

present any meaningful discussion of those decisions and does not elaborate upon the purported conflict that they represent. In fact, no such conflict exists.

In *Koch, supra*, the court held that whether or not a public employee's speech in the course of his official duties constituted speaking out on an issue of public concern for the purpose of First Amendment protection was to be determined by the particular circumstances of each case. The court rejected any "per se" rule but found that the fact that the speech occurred as part of the employee's official duties was a significant factor in determining whether it was protected. *Id.* at 1442. In fact, the court emphasized that the speech at issue in the case was a "routine official report" and concluded that it was not protected by the First Amendment. *Id.* at 1447.

The Seventh Circuit's holding in *Egger v. Phillips, supra*, is not in conflict with the Sixth Circuit's position. *Egger* merely holds that the expression of views within the workplace does not preclude protection under the First Amendment. *Id.* at 316. In *Egger*, the court held that it must consider the substance and purposes of the speech. *Id.* Yet, it stated:

> Speech which triggers the more difficult *Pickering* problems is that which implicates questions which are not of *essentially institutional concern* or of personal concern to the individuals involved, but speech which implicates broader interests with societal ramifications. (emphasis added) *Id.*

In this case, the lower courts determined that, in the context in which they were made, any statements of Petitioner were essentially of institutional concern. Therefore, the decision is consistent with the analysis in *Egger*.

Petitioner cites no other decisions which supposedly conflict with the Sixth Circuit's opinion. However, he attempts to present this case as involving an important constitutional issue by a broad discussion of what is an issue of "public concern" entitled to First Amendment protection. The bulk of Petitioner's argument is devoted to his insistence that there is need for clarification on that issue. However, that issue is not relevant to the court of appeals' decision in this case. The court of appeals simply held that, because the discussions between Petitioner and his supervisors concerned the official actions of the Department and are governed by an obligation of confidentiality, Petitioner was speaking to an internal office affair rather than speaking out on an issue of public concern. Therefore, should this Court see any need to clarify *Connick v. Meyers*, 461 U.S. 138 (1983), or to further define what issues are of "public concern", this is not the appropriate case in which to do so. The narrow factual basis for the decisions in the courts below would prevent a significant examination of those issues.

II. This Case Is Based Upon A Personnel Dispute Not Appropriate For Involvement Of The Federal Courts.

This Court has, in the past, been reluctant to become involved in disputes which are essentially personnel matters. *Bishop v. Wood*, 426 U.S. 341, 349-350 (1976). In keeping with their reluctance to become involved in such disputes, federal circuit courts have carefully approached such cases, even if the employment disputes are couched in claims based upon the First Amendment. *See e.g., Barkoo v. Melby*, 901 F.2d 613 (7th Cir. 1990). *Barkoo* states:

> Federal courts must exercise great caution before stepping into empioyment disputes, and must be convinced an actual constitutional right has been significantly impaired. *Id.* at 617.

At its crux, this case involves Petitioner's unhappiness over personnel actions during his employment. Petitioner did not receive a promotion (for which he never applied and may not have been qualified) and was involved in two incidents in which his supervisor criticized his conduct. The fact that this action originally focused on due process claims further demonstrates its roots in personnel issues.

Petitioner had available adequate administrative remedies for his complaints. The Sixth Circuit has specifically considered the administrative and judicial processes available to governmental employees in Ohio and has found them to be adequate. *Meyers v. City of Cincinnati*, 934 F.2d 726 (6th Cir. 1991). Yet, Petitioner never utilized any of these procedures. A danger involved in any modification of the decision rendered below is that it will encourage inappropriate attempts to use federal courts for employment-related complaints.

CONCLUSION

For these reasons, the motion for writ of certiorari should be denied.

Respectfully submitted,

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